[ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 25, 2008]

Nos. 05-5487, 05-5489

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMAL KIYEMBA, ET AL.,
Appellees,
v.
GEORGE W. BUSH, ET AL.,
Appellants.

EDHAM MAMET, ET AL.,
Appellees,
v.
GEORGE W. BUSH, ET AL.,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Following the Court's order of July 31, 2008, the remaining appeals involved in this case are two consolidated appeals, and two cross-appeals not being briefed here:

1. *Kiyemba* v. *Bush* (Nos. 05-5487, 05-5488): Petitioners in the district court and appellees/cross-appellants in this Court are Jamal Kiyemba (as next friend), Abdusabur Doe, Abdusamad Doe, Abdunasir Doe, Hammad Doe, Hadhaifa Doe, Jalaal Doe, Khalid Doe, and Saabir Doe. (Another appellee/cross-appellant, Saddiq Turkestani, has been dismissed from these appeals.)

Respondents in the district court and appellants/cross-appellees in this Court are George W. Bush, President of the United States; Robert M. Gates, Secretary of Defense; Rear Admiral David M. Thomas, Jr., Commander, Joint Task Force, Guantanamo Bay, Cuba; and Colonel Bruce Vargo, Commander, Joint Detention

Operations Group, Joint Task Force, Guantanamo Bay, Cuba.[1] There were no amici in the district court or in this Court.

2. *Mamet* v. *Bush* (Nos. 05-5489, 05-5490): Petitioners in the district court and appellees/cross-appellants in this Court are Edham Mamet and Ibrahim Mamet (as next friend). Respondents in the district court and appellants/cross-appellees in this Court are George W. Bush, President of the United States; Robert M. Gates, Secretary of Defense; Rear Admiral David M. Thomas, Jr., Commander, Joint Task Force, Guantanamo Bay, Cuba; and Colonel Bruce Vargo, Commander, Joint Detention Operations Group, Joint Task Force, Guantanamo Bay, Cuba.[2] There were no amici in the district court or in this Court.

B. Rulings Under Review

In these consolidated appeals, appellants are challenging the following two district court orders, which prohibit the Government from removing the petitioners from Guantanamo Bay, Cuba, unless thirty days' advance notice is given to the court and petitioners' counsel: (1) Order of September 13, 2005 (Urbina, J.), *see* Appendix

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[1] Pursuant to Fed. R. App. P. 43(c)(2), Robert M. Gates is substituted for Donald H. Rumsfeld as Secretary of Defense; Rear Admiral David M. Thomas, Jr., is substituted for Brigadier General Jay Hood as Commander, Joint Task Force, Guantanamo Bay, Cuba; and Colonel Bruce Vargo is substituted for Colonel Michael I. Bumgarner as Commander, Joint Detention Operations Group, Joint Task Force, Guantanamo Bay, Cuba.

[2] *See supra*, note 1.

to Brief of Appellants (dated June 16, 2006) ("App."), 46-48; and (2) Order of September 30, 2005 (Huvelle, J.), *see* App. 61-63. Appellees have cross-appealed from these orders but, pursuant to this Court's July 31, 2008 order, those cross-appeals are not addressed in this supplemental brief.

C. Related Cases

The Government has appealed from similar district court orders restricting the Government's ability to transfer or remove detainees from Guantanamo Bay, Cuba, in the following pending cases: *Abdah v. Bush* (No. 05-5224), *Abdullah v. Bush* (No. 05-5225), *Al-Wazan v. Bush* (No. 05-5227), *Adem v. Bush* (No. 05-5228), *Al Daini v. Bush* (No. 05-5229), *Al Hela v. Bush* (No. 05-5230), *Al Joudi v. Bush* (No. 05-5231), *Al Mohammed v. Bush* (No. 05-5232), *Al-Adahi v. Bush* (No. 05-5235), *Al-Marri v. Bush* (No. 05-5236), *Al-Oshan v. Bush* (No. 05-5237), *Anam v. Bush* (No. 05-5238), *Salahi v. Bush* (No. 05-5239), *Aziz v. Bush* (No. 05-5242), *Ameziane v. Bush* (No. 05-5243), *Tumani v. Bush* (No. 05-5244), *El-Mashad v. Bush* (No. 05-5246), *El-Banna v. Bush* (No. 05-5247), *Alhami v. Bush* (No. 05-5248), *Paracha v. Bush* (No. 05-5334), *Deghayes v. Bush* (No. 05-5337), *Slahi v. Bush* (No. 05-5338), *Chaman v. Bush* (No. 05-5339), *Zalita v. Bush* (No. 05-5353), *Al Karim v. Bush* (No. 05-5374), *El-Marqodi v. Bush* (No. 05-5390), *Hatim v. Bush* (No. 05-5398), *Sohail v. Bush* (No. 05-5478), *Abdulzaher v. Bush* (No. 05-5479), *Almerfedi v. Bush* (No. 05-5484), *Khalif v. Bush* (No. 05-5486), *Idris v. Bush* (No. 06-5037), *Sameur v. Bush*

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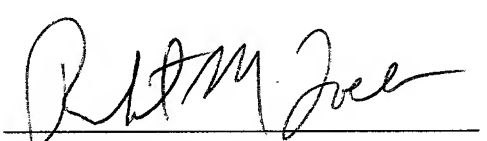
Pending appeals in which petitioners challenge the denial of motions requesting restrictions upon transfer are: *Al-Ginco v. Bush* (No. 06-5191), *Sanani v. Bush* (No. 07-5043), and *Zalita v. Bush* (No. 07-5129).

Counsel is not aware at this time of any other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).



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CAT . . . . . Convention Against Torture

DTA . . . . . Detainee Treatment Act

FARRA . . . . . Foreign Affairs Reform & Restructuring Act

MCA . . . . . Military Commissions Act

Resp. . . . . Response to Motion to Govern Further Proceedings

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Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR APPELLANTS

INTRODUCTION

Appellants respectfully submit this supplemental brief pursuant to this Court's July 31, 2008 order.

These appeals arise out of habeas corpus actions filed in the district court by aliens detained as enemy combatants by the Department of Defense at Guantanamo Bay, Cuba. In those habeas actions demanding their release from Guantanamo,

petitioners-appellees sought preliminary injunctive relief barring their transfer from Guantanamo Bay to another country, absent thirty days' notice to the court and to petitioners' counsel. The district court entered two orders requiring such notice. *See* App. 46-48, 61-63.[1] The Government appealed because, as shown in our opening and reply briefs, the district court lacked jurisdiction to enjoin petitioners' transfer or release from Guantanamo Bay, and, in any event, the orders violate separation-of-powers principles and are otherwise without legal basis. Moreover, these (and other similar) orders have the significant practical effect of impairing the Government's ongoing efforts to transfer or release detainees from Guantanamo Bay when the Government has determined that their continued detention is no longer warranted.

There have been three new developments since these appeals were initially briefed and argued on September 11, 2006. Specifically, Congress enacted the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"), and the Supreme Court issued decisions in *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008), and *Munaf* v. *Geren*, 128 S. Ct. 2207 (2008). As demonstrated in this supplemental brief, while the MCA alters the statutory analysis, the ultimate conclusion remains the same: (1) the district court orders must be vacated for lack of subject-matter jurisdiction, (2) in the alternative, the orders must be reversed

[1] "App. __" refers to page numbers in the appendix we submitted with our initial brief.

because they violate constitutional separation of powers, and (3) the orders must be set aside in any event because petitioners have failed to demonstrate, and cannot demonstrate, their entitlement to preliminary injunctive relief under the applicable four-factor test.

STATEMENT OF THE ISSUES

1. Whether the MCA divests the district court of jurisdiction to enjoin petitioners' transfer or release from United States custody.

2. Whether the injunctions barring petitioners' transfer violate constitutional separation of powers by impinging upon the President's authority as Commander-in-Chief and the political branches' authority over foreign affairs.

3. Whether the injunctions must be reversed in any event because the district court failed to consider whether petitioners satisfied the standards for preliminary injunctive relief, and because those standards cannot be satisfied here as a matter of law.

SUMMARY OF ARGUMENT

1. The district court's injunctions barring petitioners' transfer absent thirty days' advance notice should be vacated for lack of subject-matter jurisdiction. In the MCA, Congress expressly eliminated jurisdiction over habeas actions brought by aliens detained by the United States as enemy combatants, 28 U.S.C. § 2241(e)(1),

as well as over actions challenging any other aspects of detention, including the aliens' transfer from United States custody, 28 U.S.C. § 2241(e)(2). These provisions prohibit the district court from exercising jurisdiction to bar petitioners' release from United States custody.

Boumediene invalidated section 2241(e)(1) only insofar as that provision deprives Guantanamo detainees of a constitutionally protected right to bring a habeas corpus action challenging their *detention*. The Supreme Court has made clear, most recently in both *Boumediene* and *Munaf*, that the scope of the constitutionally protected writ is narrow, and is limited to challenges to the legality of detention. Thus, to the extent section 2241(e)(1) eliminates jurisdiction over actions that challenge ancillary issues beyond the constitutional core of habeas, that provision remains valid. Petitioners' efforts to restrict their release from United States custody constitute such ancillary matters, and the district court, therefore, lacks jurisdiction over such claims.

In any event, section 2241(e)(2) specifically eliminates jurisdiction over actions relating to the transfer of an alien detained as an enemy combatant. That subsection plainly precludes jurisdiction over petitioners' challenge to their potential transfer from United States custody. Because section 2241(e)(2) does not affect any constitutional habeas right held by the Guantanamo detainees to challenge their

detention, but only their ability to raise ancillary challenges, *Boumediene* provides no basis for invalidating that provision, and it remains fully operative.

2. Even if the district court had jurisdiction to consider petitioners' actions challenging their transfer, the injunctions nevertheless must be reversed because they violate separation-of-powers principles. As explained in our initial briefs, the injunctions impermissibly encroach upon the President's powers as Commander-in-Chief and the political branches' responsibility over foreign policy. The Supreme Court's recent decision in *Munaf* further buttresses this conclusion. *Munaf* vacated an injunction barring the transfer to a foreign government of a habeas petitioner held by the United States military, reasoning that such a judicial order is legally impermissible. That decision confirms that courts may not second-guess the kind of Executive determination regarding the transfer of detainees that is at issue here.

3. Even if this Court were to reach the merits of petitioners' claims, the injunctions cannot be sustained. Without conducting the traditional balancing test for injunctive relief, the district court entered the injunctions based on its conclusions that it had jurisdiction and that the injunctions were necessary to preserve that jurisdiction. The Supreme Court held in *Munaf* that such reasoning constitutes reversible error *per se*; preserving habeas corpus jurisdiction is not a sufficient basis for entering an injunction, and the traditional balancing test must still be met.

Munaf also confirms the final point made in our previous briefs – the traditional balancing test is not satisfied here. Petitioners cannot demonstrate a likelihood of success in the relevant sense because, even if their detention were unlawful, they would still have no right to dictate how or to where they would be transferred or released. And the jurisdictional problem noted above further demonstrates that plaintiffs cannot succeed. Moreover, injunctive relief here would necessarily require a court to conclude that, contrary to the United States' express policy and the Executive's determination, petitioners were to be transferred to countries in which they were likely to be tortured. *Munaf* demonstrates that petitioners' claims of torture are far too speculative and, at any rate, forbids the judiciary in this context from second-guessing the Executive's determination with respect to the likelihood of torture. Finally, by interfering with sensitive negotiations with foreign governments and preventing the Executive Branch from releasing petitioners as soon as it determines is appropriate, the injunctions harm third parties and the public interest. The orders of the district court, if not vacated, should be reversed.

ARGUMENT

I. SECTION 7 OF THE MCA DEPRIVES THE DISTRICT COURT OF JURISDICTION OVER MATTERS RELATING TO THE TRANSFER OF DETAINEES

On October 17, 2006, after these appeals were briefed and argued, the President signed the MCA into law. In section 7(a) of the MCA, 28 U.S.C. § 2241(e), Congress expressly withdrew federal jurisdiction over two independent types of actions regarding aliens detained by the United States as enemy combatants. First, Congress eliminated jurisdiction over habeas actions:

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2241(e)(1). Second, Congress also separately withdrew federal court jurisdiction over challenges to any other aspects of detention:

> [N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents *relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien* who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2241(e)(2) (emphasis added). Together, these provisions require that the district court injunctions here, barring petitioners' transfer from Guantanamo Bay, be vacated for lack of jurisdiction.

A. The MCA Validly Precludes Jurisdiction Over Any Challenge By An Alien Detained As An Enemy Combatant, Other Than A Core Habeas Action Challenging His Detention

In *Boumediene*, the Supreme Court held that aliens detained as enemy combatants at Guantanamo Bay have a constitutional right to challenge their detention through an action for a writ of habeas corpus, and that the first part of section 7 of the MCA, 28 U.S.C. § 2241(e)(1), insofar as it prohibits Guantanamo detainees from pursuing such an action, "operates as an unconstitutional suspension of the writ." 128 S. Ct. at 2240. Thus, *Boumediene* invalidated that provision only insofar as it deprived Guantanamo detainees of a right to bring habeas corpus actions challenging their *detention* – that being the core habeas corpus right protected by the Suspension Clause. The parties did not brief, and Supreme Court did not address, however, the issue of whether a court may exercise jurisdiction, notwithstanding section 7 of the MCA, to bar or otherwise restrict the release of a detainee from United States custody. As we explain below, because such a claim does not rest upon a core habeas corpus right protected by the Suspension Clause, the rationale of

Boumediene does not extend to invalidate section 2241(e)(2)'s jurisdictional bar over a detainee's efforts to restrict his release from United States custody.

1. The Supreme Court has made clear that the traditional – and thus constitutionally protected – writ is limited. Although the Supreme Court has never decided whether the meaning of the Suspension Clause was fixed in 1789, or whether the Clause might evolve consistent with the expansion of statutory habeas over the course of American history, *see Boumediene*, 128 S. Ct. at 2248 (declining to decide whether the "protections of the Suspension Clause have expanded along with post-1789 developments"); *INS* v. *St. Cyr*, 533 U.S. 289, 304-05 (2001) (reserving the question), the better view is that the meaning of the Clause was fixed in 1789. Indeed, it is "too absurd to be contemplated" that the Clause would operate as a "one-way ratchet that enshrines in the Constitution every grant of habeas jurisdiction" conferred by statute or judge-made common law. *St. Cyr*, 533 U.S. at 341-42 (Scalia, J., dissenting). Nor are there any apparent judicially manageable standards for determining *how much* the Suspension Clause might evolve between the historical standard of 1789 and contemporaneous statutory standards.

In any event, regardless of whether the Suspension Clause protects the common-law writ as it existed in 1789 or a more expansive version of the writ, it does not constitutionalize every aspect of modern habeas practice. The Supreme Court,

in fact, has recognized that "judgments about the proper scope of the writ are 'normally for Congress to make.'" *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996). And the courts have consistently interpreted Congress to have intended the scope of the writ to be limited. *See, e.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475, 484 (1973) ("[T]he traditional function of the writ is to secure release from illegal custody."); *Pischke* v. *Litscher*, 178 F.3d 497, 499 (7th Cir. 1999) (habeas action is proper "only if the prisoner is seeking to 'get out' of custody in a meaningful sense"); *Doe* v. *Pennsylvania Bd. of Probation & Parole*, 513 F.3d 95, 100 n.3 (3d Cir. 2008) (habeas is limited to "[a]ttacks on the fact or duration of confinement"); *Hutcherson* v. *Riley*, 468 F.3d 750, 754 (11th Cir. 2006) (same).

With this limitation in mind, the Supreme Court has refused to extend even *statutory* habeas corpus to encompass challenges to anything other than the fact or duration of detention. *See Bell* v. *Wolfish*, 441 U.S. 520, 526 n.6 (1979) ("[W]e leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself."); *see also Wilkinson* v. *Dotson*, 544 U.S. 74, 86 (2005) (Scalia, J., concurring) (conditions-of-confinement claims in habeas would "utterly sever the writ from its common-law roots"); *Brown* v. *Plaut*, 131 F.3d 163, 168-69 (D.C. Cir. 1997) (using habeas corpus for conditions-of-confinement claims would extend the

writ beyond its core); *Miller* v. *Overholser*, 206 F.2d 415, 419-20 (D.C. Cir. 1953) (recognizing that a habeas action "is not the correct remedy" for challenging "discipline or treatment").

Thus, even before the MCA, a detainee could not have brought ancillary claims, including challenges to transfer, under *statutory* habeas jurisdiction, as explained in our full merits briefs. And if statutory habeas jurisdiction prior to the MCA did not encompass efforts to restrict a detainee's release from custody or challenges to conditions of confinement, *a fortiori* the core habeas right protected by the Suspension Clause does not permit such claims. *See Rasul* v. *Bush*, 542 U.S. 466, 474 (2004) ("[H]abeas statute clearly has expanded habeas corpus 'beyond the limits that obtained during the 17th and 18th centuries.'").

The Supreme Court's unanimous decision in *Munaf* v. *Geren*, 128 S. Ct. 2207 (2008), decided the same day as *Boumediene*, further supports this understanding of the writ's narrow scope. In *Munaf*, two American citizens held in Iraq by the United States military, which was operating as part of a multinational force, filed habeas petitions seeking to prevent the United States from transferring them to the custody of the Iraqi government for criminal proceedings. The district court issued the requested injunction, and this Court affirmed.

The Supreme Court, however, admonished that "[h]abeas is at its core a remedy for unlawful detention * * * * The typical remedy is, of course, release." *Munaf*, 128 S. Ct. at 2211. Accordingly, the Court held that the type of relief sought – an injunction barring petitioner's transfer from United States custody to the custody of another sovereign – was not available in habeas, even where such transfer would eliminate the district court's jurisdiction over the core habeas action challenging the petitioner's detention, and even where there were allegations of torture. *Id.* at 2228. *Munaf*, therefore, rejects the notion that there is even a statutory, much less a constitutional, habeas right to challenge a transfer from custody. Likewise here, petitioners' challenges to their potential transfer from United States custody are well beyond core habeas relief.[2]

Boumediene's discussion of what is constitutionally required in habeas proceedings confirms this analysis. That discussion does not suggest that Guantanamo detainees have a right to bring "other action[s]" related to "aspects" of their detention. Instead, the discussion is phrased in terms that narrowly limit a detainee's habeas action to a challenge to his detention. *See, e.g., Boumediene*, 128

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[2] For similar reasons, Rule 23(a) of the Federal Rules of Appellate Procedure has been read not to extend to a decision to release a Guantanamo detainee from the custody of the United States. *Qassim* v. *Bush*, 466 F.3d 1073 (D.C. Cir. 2006); *O.K.* v. *Bush*, 377 F.Supp.2d 102, 116 (D.D.C. 2005). *See also Brady* v. *U.S. Parole Comm'n*, 600 F.2d 234, 236 (9th Cir. 1979).

S. Ct. at 2266 ("We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being *held* pursuant to 'the erroneous application or interpretation' of relevant law."); *id.* at 2269 ("The habeas court must have sufficient authority to conduct a meaningful review of both the cause for *detention* and the Executive's power to *detain*."); *id.* at 2273 (detainee must have opportunity to present "reasonably available evidence demonstrating there is no basis for his continued *detention*.") (emphases added); *see also In re Guantanamo Bay Detainee Litigation*, ___ F. Supp. 2d ___, 2008 WL 3155155, *3 (D.D.C. Aug. 7, 2008) ("In deciding *Boumediene*, the Court limited its analysis to whether detainees could challenge the legality of their *detention* through constitutional habeas.") (emphasis added). None of *Boumediene*'s language suggests that a petitioner's *constitutional* habeas rights include a right to challenge, for instance, the terms of transfer or conditions of confinement.

2. Because the constitutional defect the Court found in *Boumediene* with regard to section 2241(e)(1) concerned only the detainees' ability to bring core habeas challenges to the legality of detention, and not ancillary issues such as transfer or conditions of confinement, *Boumediene* invalidated section 2241(e)(1) only as applied to the particular factual situation presented. *See Ayotte* v. *Planned Parenthood*, 546 U.S. 320, 328-29 (2006) ("[T]he 'normal rule' is that 'partial, rather

than facial, invalidation is the required course[.]'"). Thus, in light of this Court's obligation to preserve as much of a statute as is legally permissible, section 2241(e)(1) should remain operative in other respects. *See id.* at 328-29 ("when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force[.]"). Moreover, there is no practical obstacle to preserving section 2241(e)(1)'s constitutional applications, given that courts can readily distinguish between those applications – barring jurisdiction over collateral challenges – and unconstitutional applications – barring jurisdiction over core habeas actions challenging detention. *See id.* at 329-30 (partial invalidation is appropriate where line-drawing between constitutional and unconstitutional applications of statute is a "'relatively simple matter'"). In addition, preserving section 2241(e)(1)'s elimination of jurisdiction over collateral challenges is consistent with Congress's clear intent to eliminate jurisdiction over Guantanamo detainees' efforts to restrict their transfer or release from United States custody. *See id.* at 330 ("touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature'").

Under a proper reading of *Boumediene*, section 2241(e)(1) remains effective insofar as it eliminates the jurisdiction of the district court to hear any aspect of a

habeas corpus claim that is *not* a challenge to detention, including petitioners' challenge to their potential transfer from Guantanamo Bay. Section 2241(e)(1) thus requires vacatur of the district court injunctions for want of jurisdiction.

B. *Boumediene* Did Not Invalidate The MCA Provision That Eliminates Jurisdiction Over Actions Challenging Transfer

The second provision of section 7 of the MCA, 28 U.S.C. § 2241(e)(2), which eliminates the jurisdiction of the district court over any action against the United States "relating to any aspect of the * * * transfer" of an alien detained as an enemy combatant, also bars that court from issuing injunctions prohibiting petitioners' transfer from Guantanamo Bay. Such injunctions obviously "relat[e] to * * * transfer" within the meaning of 28 U.S.C. § 2241(e)(2). Because *Boumediene* does not call into question the constitutionality of that provision, the district court injunctions must be vacated for lack of jurisdiction. *See Guantanamo Bay Detainee Litigation*, 2008 WL 3155155, *3 (concluding that *Boumediene* did not invalidate § 2241(e)(2)).

The Court's decision in *Boumediene* cannot plausibly be read to cast any doubt on the continuing validity of section 2241(e)(2). The Court's opinion discusses the detainees' constitutional right to bring only core *habeas* actions – challenging their detention – as opposed to the broader class of "any other action * * * relating to any aspect of the detention." *See, e.g., Boumediene*, 128 S. Ct. at 2262 ("Petitioners,

therefore, are entitled to the privilege of habeas corpus *to challenge the legality of their detention.*") (emphasis added). Unlike section 2241(e)(1), section 2241(e)(2) in no way impairs Guantanamo detainees' ability to pursue a writ of habeas corpus. Rather, section 2241(e)(2) simply limits *other* types of actions that detainees might bring. The Court explicitly distinguished between habeas actions governed by section 2241(e)(1), and *other, non-habeas* actions governed by section 2241(e)(2). *See Boumediene*, 128 S. Ct. at 2243. Because section 2241(e)(2) does not affect any constitutional habeas right held by Guantanamo detainees to challenge their detention, the Suspension Clause provides no basis for invalidating that provision.

Although *Boumediene* refers generally to section 7 without identifying a particular subsection of 28 U.S.C. § 2241(e), *see, e.g., Boumediene*, 128 S.Ct. at 2274 ("MCA § 7 thus effects an unconstitutional suspension of the writ."); *id.* at 2275 ("The only law we identify as unconstitutional is MCA § 7, 28 U.S.C.A. § 2241(e) (Supp. 2007)."), that is an insufficient basis to construe the Court's opinion as invalidating *all* of section 7, including section 2241(e)(2), particularly when that provision was not at issue, and the Court's rationale for invalidating section 2241(e)(1)'s jurisdictional bar over core habeas challenges has no application to it. It is well established that, in determining the scope of a Supreme Court ruling, the Court's opinion must be read in context, with a recognition of what issues were,

and were not, presented to the Court. *See Landgraf* v. *USI Film Products*, 511 U.S. 244, 265 (1994) (citing the "canon of unquestionable vitality, * * * that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used"). Here, the relevant context was a contention that section 2241(e)(1) violated the Suspension Clause insofar as it purported to bar a habeas challenge to the fact of detention. In context, the Court's generic reference to section 7 must be construed as referring specifically to that portion of section 7 that eliminated jurisdiction over habeas challenges to detention. Indeed, at one point in its opinion, the Court clearly uses section 7 as short-hand for referring to section 2241(e)(1)'s elimination of habeas jurisdiction over detention challenges. *See Boumediene*, 128 S. Ct. at 2265 (stating that § 7 is the source of the relevant "jurisdiction-stripping language," but citing specifically to subsection 2241(e)(1)).

For this Court to hold that *Boumediene* invalidated section 2241(e)(2), it would have to conclude that while the Supreme Court *expressly* held that section 2241(e)(1) is unconstitutional as applied to Guantanamo detainees insofar as it eliminates their constitutional right to bring a habeas action challenging their detention, it *sub silentio* determined the constitutionality of section 2241(e)(2). But if it had intended to pass on section 2241(e)(2)'s constitutionality, the Court would have had to determine that conditions-of-confinement and treatment claims – specifically barred by

section 2241(e)(2) – are within the detainees' constitutional habeas right, so that eliminating jurisdiction over those claims jeopardized that constitutional right. The Court, however, expressly declined to address the constitutionality of section 2241(e)(2): "we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement." 128 S. Ct. at 2274. *See also Guantanamo Bay Detainee Litigation*, 2008 WL 3155155, *3. In addition, the fact that the constitutionality of section 2241(e)(2) was never decided below (nor raised on appeal) in *Boumediene* further supports the argument that the Court did not invalidate that provision. *See Belbacha* v. *Bush*, 520 F.3d 452, 455 (D.C. Cir. 2008) ("In *Boumediene* we held that *§ 7(a)(1)* [28 U.S.C. § 2241(e)(1)] of the MCA does not violate the Suspension Clause of the Constitution") (emphasis added).

After "an application or portion of a statute [is held to be] unconstitutional, * * * [a court] must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" *Ayotte*, 546 U.S. at 330. Here, that answer is clear. The text and history of MCA section 7 demonstrate that Congress surely intended section 2241(e)(2) to survive, even if the elimination of core habeas jurisdiction in section 2241(e)(1) did not. In enacting the MCA, Congress sought to eliminate jurisdiction over issues ancillary to detention precisely to prevent the Executive Branch from having to divert significant resources during an armed conflict to

respond to those claims. *See, e.g.*, 152 Cong. Rec. S10367 (daily ed. Sept. 28, 2006) (Sen. Graham) (citing one petitioner's motion for a preliminary injunction regarding conditions of confinement as an example of a claim that should be barred); 151 Cong. Rec. S12652, 12656-57 (daily ed. Nov. 10, 2005) (Sen. Graham) (noting that the Detainee Treatment Act ("DTA") was intended to limit detainees' right to "challenge their status"); *id.* at S12659-60 (Sen. Kyl) (stating that the DTA would grant detainees "substantial rights to contest their status but not the right to clog up Federal courts" with medical malpractice claims and complaints about food).

Regardless of whether challenges to detention are ultimately heard in the D.C. Circuit (as Congress intended) or in district court through habeas (as the Supreme Court has now mandated), Congress nevertheless could – and did – intend to eliminate judicial review of transfer, conditions-of-confinement, and other collateral challenges. Section 2241(e)(2), accordingly, is properly read to remain in force. *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987) ("[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted."); *News America Pub., Inc.* v. *Federal Commc'ns Comm'n*, 844 F.2d 800, 802 (D.C. Cir. 1988) (presumption is in favor of severability). *See also Wyoming* v. *Oklahoma*, 502 U.S. 437, 460 (1992) ("a

reviewing court must preserve as much of a statute as is legally permissible. Thus, 'a court should refrain from invalidating more of the statute than is necessary'").

II. THE INJUNCTIONS VIOLATE THE CONSTITUTIONAL SEPARATION OF POWERS BY PROHIBITING THE GOVERNMENT FROM TRANSFERRING OR RELEASING PETITIONERS FROM DETENTION

Even apart from the lack of subject-matter jurisdiction, the district court injunctions are improper because they violate separation-of-powers principles on the merits. As explained in our initial briefs, the injunctions permit the district court, without authorization from Congress, to superintend the Executive's exercise of discretion in determining the circumstances surrounding a detainee's release from United States custody, and therefore impinge upon the President's authority as Commander-in-Chief and interfere with the political branches' responsibility for foreign policy. *See* Brief for Appellants (June 16, 2006) ("US Br.") at 35-37; Reply Brief for Appellants and Brief for Cross-Appellees (Aug. 2, 2006) ("US Reply"), at 12-16. Those arguments still hold true and require reversal. The Supreme Court's recent decision in *Munaf*, in which the Court struck down an injunction barring the transfer of an American citizen from the United States military to the Iraqi government, further confirms that the district court injunctions barring petitioners' transfer from Guantanamo Bay are beyond the court's authority.

A. The Injunctions Impinge Upon The President's Commander-In-Chief Authority And The Political Branches' Foreign Policy Function

The injunctions here affirmatively bar petitioners' transfer or release from Guantanamo Bay absent thirty days' notice. As explained in our initial briefs, those orders undermine the President's critical wartime powers, as Commander-in-Chief, to capture individuals in an armed conflict specifically authorized by the Congress, detain them as enemy combatants, and release them at the end of the conflict or upon determining that the need for detention has otherwise abated. *See* US Br. at 35-36; US Reply at 13-14. The injunctions curtail the President's authority by, at a minimum, requiring a thirty-day postponement from the time that the President decides to transfer or release one of the petitioners until the time that he may effect that transfer.

At least as significantly, the injunctions impair the President's authority as Commander-in-Chief by rendering his decisions regarding transfer or release contingent upon judicial approval. The injunctions are designed to afford petitioners an opportunity to challenge – and the district court to scrutinize and possibly enjoin – impending transfers of military detainees. *See* Response to Motion to Govern Further Proceedings (July 14, 2008) ("Resp.") at 5 (suggesting that after the required advance notice of transfer is given, "it would be for the district courts * * * to resolve

any opposition to that transfer in the first instance, upon a full consideration of the factual and legal merits"). Because the injunctions barring transfer foreshadow judicial review of the President's transfer decisions, they cross the constitutional barrier between the Judicial and the Executive roles. *See* US Br. at 37.

Our initial briefs further explained that the injunctions undermine the Executive Branch's authority to conduct foreign policy on behalf of the Nation. *See* US Br. at 36-37 (citing *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 381 (2000) (expressing disapproval of acts that "compromise the very capacity of the President to speak for the nation with one voice in dealing with other governments")). We explained that because the Departments of Defense and State may be required to engage in sensitive negotiations with other nations when deciding to transfer an enemy combatant to a foreign country, the very prospect of judicial review, as exemplified by the advance notice requirement, causes an additional separation-of-powers harm by undermining the ability of the United States to speak with one voice in dealing with foreign nations. *See* US Br. at 36-37. Moreover, requiring any disclosure of the content of sensitive negotiations with foreign countries threatens another harm: "If the [Government] were required unilaterally to disclose outside appropriate Executive Branch channels its communications with a foreign government * * * , that government, as well as other governments, would likely be

reluctant in the future to communicate frankly with the United States[,]" impeding our Government's ability to obtain vital cooperation from other governments in the war on terror. Prosper Decl. ¶ 10, App. 106; *see also* US Br. at 36.

The injunctions would make the results of diplomatic dialogue between the Executive Branch and a foreign government regarding releases or transfers inherently contingent because the effective acquiescence of the courts would be required for the transfer or release to be effectuated. But the Constitution confers decision-making authority in the foreign policy arena to the political branches of the Government, not the courts. *See* US Br. at 36-37 (citing *Joo* v. *Japan*, 413 F.3d 45, 52-53 (D.C. Cir. 2005) (adjudication that "would undo" Executive's judgment in foreign policy "would be imprudent to a degree beyond our power"); *Schneider* v. *Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005) (there is "no doubt that decision-making in the fields of foreign policy and national security is textually committed to the political branches of the [G]overnment")); US Reply at 16 (citing *People's Mojahedin Org.* v. *Dep't of State*, 182 F.3d 17, 23 (D.C. Cir. 1999)). For all of these reasons, the district court orders here cannot survive separation-of-powers scrutiny.

B. *Munaf* Reaffirms That The Separation Of Powers Mandates Reversal

The Supreme Court's recent decision in *Munaf* reaffirms the conclusion that the injunctions here violate the separation of powers. *Munaf* struck down an

injunction barring a detainee from being transferred by the United States military to the Iraqi government. Petitioners in *Munaf*, like petitioners here, contended that an injunction prohibiting transfer was necessary because they alleged a fear of torture by the receiving government.

The Supreme Court in *Munaf*, however, gave great weight to the Solicitor General's statement that "it is the policy of the United States *not* to transfer an individual in circumstances where torture is likely to result." 128 S. Ct. at 2226. The record on appeal here reflects that same policy – the Executive will not "repatriate or transfer individuals to other countries where it believes it is more likely than not that they will be tortured." *See* Waxman Decl. ¶ 6, App. 110; *accord* Prosper Decl. ¶ 4, App. 101-02.

In *Munaf*, the Court also explicitly held that judicial review of the Executive's determination respecting the likelihood of torture in this context would be improper. The Court explained that "[t]he Judiciary is not suited to second-guess such determinations – determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." 128 S. Ct. at 2226 (*citing* The Federalist No. 42, p. 279 (J. Cooke ed. 1961) (J. Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations")). The Court stressed that, "[i]n contrast, the political

branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." *Id.*; *accord id.* at 2225 ("Even with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments.").

Congress has also made a determination that claims such as petitioners' here should not be judicially reviewable in this context. As *Munaf* explained, the Convention Against Torture ("CAT") is implemented in the United States by the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, § 2242, 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note), which expressly limits jurisdiction over CAT claims to review of final immigration removal orders. *See Munaf*, 128 S. Ct. at 2226 & n.6; *see also* FARRA § 2242(d); *Mironescu* v. *Costner*, 480 F.3d 664, 672 (4th Cir. 2007), *cert. dismissed*, 128 S. Ct. 976 (2008); *Al-Anazi* v. *Bush*, 370 F. Supp. 2d 188, 194 (D.D.C. 2005); 8 U.S.C. § 1252(a)(4) (CAT claims are not cognizable in a habeas petition). No such removal order is at issue here. Judicial review of petitioners' CAT claims, which is what the injunctions here are designed to allow, would therefore intrude not only on the authority of the Executive Branch, but also on that of the Legislative Branch. *Munaf*, 128 S. Ct. at 2226

("sensitive foreign policy issues" are left to the consideration of the "political branches," not the courts).[3]

Munaf therefore invoked the same separation-of-powers principles that we have raised here, *see* Prosper Decl. ¶ 6, App. 102-03; Waxman Decl. ¶¶ 6-7, App. 110-11, and determined that those principles prohibit the district court from enjoining transfer. Indeed, for petitioners to obtain ultimate relief with respect to transfer, the district court would have to conclude that they would likely be tortured in the receiving country. Under *Munaf*, however, the district court has no authority to pass upon the Executive's determination to the contrary. The limitations on the role of the courts preclude the kind of relief sought and awarded in this case.

III. PRELIMINARY INJUNCTIVE RELIEF IS IN ANY EVENT NOT WARRANTED UNDER THE TRADITIONAL FOUR-PART BALANCING TEST

Even apart from the fact that the MCA's jurisdictional bar precludes issuance of an injunction against transfer, and the fact that the injunctions otherwise violate

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[3] Moreover, as we explained in our opening brief (pp. 47-48), Article 3 of the CAT does not create judicially enforceable rights. Nor does it apply extraterritorially. Notably, when submitted to the Senate for ratification, it was understood that the non-refoulement obligations would apply to removal or extradition from the United States, and not to extraterritorial action by United States officials. *See* Message from the President Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Treaty Doc. 100-20, at 6; S. Exec. Rep. No. 101-30 at 16-17.

separation of powers, petitioners also cannot establish that they are entitled to preliminary injunctive relief on the merits. "[A] preliminary injunction is an 'extraordinary and drastic remedy'" that "is never awarded as of right." *Munaf*, 128 S. Ct. at 2219. By a clear showing, a movant must carry the burden of persuasion by "'demonstrat[ing] 1) a substantial likelihood of success on the merits, 2) that [he] would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction.'" *Katz* v. *Georgetown Univ.*, 246 F.3d 685, 687-88 (D.C. Cir. 2001). As explained in our initial briefs, under that standard, it is clear that petitioners cannot obtain the requested injunctive relief. *See* US Br. at 38-52. The Supreme Court's decision in *Munaf* reinforces that conclusion and, for this reason too, mandates reversal of the district court's orders.

A. Reversal Is Mandated For Failure To Apply The Four-Factor Test

As an initial matter, *Munaf* requires reversal of the district court injunctions because the district court failed to even address the four-factor balancing test before issuing the injunctions. In *Munaf*, the district court granted a preliminary injunction barring petitioner's transfer because the court intended to consider the underlying jurisdictional questions, and if the petitioner were transferred, whatever jurisdiction it possessed would be eliminated. *See Munaf*, 128 S. Ct. at 2219. The Supreme Court

held that this approach was in error and that entry of injunctive relief without applying the traditional balancing test was itself grounds for reversal. *Id.* Because the district court orders here suffer from precisely the same defect, those orders must be reversed on that ground alone.

B. Petitioners Cannot Meet Their Burden Under The Four-Factor Test

Petitioners cannot in any event satisfy the test for obtaining injunctive relief. Indeed, petitioners satisfy none of the essential elements for obtaining such relief.

1. Petitioners Cannot Show Any Likelihood Of Success On The Merits

Petitioners cannot demonstrate that they are ultimately likely to succeed on the merits. The relevant likelihood of success analysis focuses on whether petitioners could ultimately obtain orders preventing the United States from terminating their detentions by transferring them to other countries. The merits of petitioners' underlying claims that they are being illegally detained are not at issue in determining the validity of the injunctions. *See Al-Anazi*, 370 F. Supp. 2d at 194 ("[T]he presence of a sound basis to challenge the legality of one's *detention* does not at all imply that there exists a sound basis to challenge the legality of one's *transfer*. Put differently, the 'merits,' if you will, to be assessed for purposes of the present claim for preliminary injunctive relief, [are] petitioners' challenge to their *transfer* from Guantanamo, not to their *detention* at Guantanamo."); *Abdah* v. *Bush*, 2005 WL

711814, *4 (D.D.C. Mar. 29, 2005) ("*if* there are no circumstances under which [p]etitioners could obtain a court order preventing a contemplated *transfer*, a preliminary injunction should not be granted") (second emphasis added); *cf. Munaf*, 128 S. Ct. at 2227-28 (dismissing habeas corpus claim without reference to the lawfulness of the petitioner's detention, because the specific relief petitioner sought was not available).

Here, even if petitioners could ultimately succeed in challenging the legality of their *detentions*, they have not demonstrated how such success would entitle them to an injunction against *transfer*. To the contrary, transfer would provide petitioners with "[t]he typical remedy" for illegal detention, namely, "release" from the custody of the United States. *Munaf*, 128 S. Ct. at 2211; *see* Waxman Decl. ¶ 5, App. 109-10 (noting that "once transferred, [the former detainee] is no longer in the custody and control of the United States"). Thus,

> [w]ere the [district court] to * * * ultimately determine that the United States may no longer detain the petitioners, the parties and the [district court] would find themselves in precisely the same position in which they find themselves now – with the respondents taking steps to transfer those individuals out of United States control, and the petitioners compelled to come forward with some legal or evidentiary basis to prevent transfer to an 'undesirable' country.

Al-Anazi, 370 F. Supp. 2d at 196.

Petitioners cannot show that they are likely to succeed in obtaining an injunction prohibiting transfer because, as explained in Section I, *supra*, the MCA, 28 U.S.C. § 2241(e), eliminates federal court jurisdiction over actions challenging transfer. If, as the Supreme Court recently explained in *Munaf*, "[a] difficult question as to jurisdiction" makes success on the merits "more *unlikely*," 128 S. Ct. at 2219, then *a fortiori*, the absence of jurisdiction makes success on the merits impossible. Similarly, petitioners are not likely to succeed in obtaining the ultimate relief of a bar against transfer because such relief would violate the separation of powers, as explained in Section II, *supra*.

Munaf confirms that petitioners are unlikely to succeed, because the Supreme Court rejected the same two legal bases for relief that petitioners proffer here. First, petitioners suggest that they are entitled to injunctions barring their transfer because the district court has jurisdiction over their habeas corpus claims and, absent the injunctions, their transfer would eliminate that jurisdiction. *See* Resp. at 2. Even if the district court's habeas jurisdiction were deemed to encompass petitioners' challenge to their transfer, contrary to both the MCA and *Boumediene*, the Supreme Court made clear in *Munaf* that simply preserving such jurisdiction is not an adequate basis for injunctive relief. 128 S. Ct. at 2219.

Second, petitioners allege a concern that "they may be transferred to the custody of a foreign government * * * without proper consideration of the likelihood that they will be tortured by the transferee government." App. 34. As explained above, this cannot form the legal basis for an injunction against transfer. *Munaf* made clear that, in this context, the Executive decides "the likelihood that [petitioners] will be tortured by the transferee government," and "[t]he Judiciary is not suited to second-guess such determinations." 128 S. Ct. at 2226. Particularly for detainees held abroad and outside the immigration context, habeas review does not encompass inquiry into the treatment a petitioner may receive in a country to which he is transferred. *Id.*

Nor can petitioners show a reasonable likelihood of success on the merits by reference to the CAT. *See* US Br. at 47-48. *Munaf* supports that conclusion as well. As explained above, Congress has provided that CAT claims are reviewable only in the context of a final immigration removal order, which is not at issue here. *See Munaf*, 128 S. Ct. at 2226 & n.6; *see also* FARRA § 2242(d).

2. Petitioners Cannot Show Any Cognizable Irreparable Injury

As we have explained, neither of petitioners' asserted injuries – the alleged fear of torture at the hands of a receiving country and the district court's loss of

jurisdiction over their habeas cases – qualifies as a harm justifying the injunctions entered here. Again, *Munaf* confirms that this argument is correct.

To demonstrate irreparable harm, a petitioner must show irreparable injury that is "actual and not theoretical," and is sufficiently imminent as to create "a clear and present need for equitable relief[.]" *Chaplaincy of Full Gospel Churches* v. *England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (citations and internal quotation marks omitted). This "high standard," *id.*, is plainly not met by petitioners' speculation that they may suffer harm in hypothetical receiving countries.

Munaf has now made clear that generalized allegations of potential mistreatment are insufficient in the face of the United States' express policy not to transfer an individual where the Government believes it is more likely than not that he would be tortured. 128 S. Ct. at 2226 ("Petitioners here allege only the *possibility* of mistreatment in a prison facility [of the receiving government].") (emphasis added). *Munaf* explained that the United States had concerns regarding "some sectors of the Iraqi government," but had concluded that the specific Iraqi government department receiving the petitioner and the specific facilities in which the petitioner would be held were not likely to result in the petitioner being tortured. *Id.* The Court found that determination to be conclusive. *Id.*

Munaf shows that the Executive's policy respecting transfer is entitled to great weight. *See id.* at 2226. Here, as in *Munaf*, the record demonstrates that United States policy is not to transfer a detainee to a country where the United States believes it is more likely than not that he will be tortured. *See* Waxman Decl. ¶ 6, App. 110; *accord* Prosper Decl. ¶ 4, App. 101-02. This policy is implemented by responsible Executive agencies through a process reflecting several levels of precautions and safeguards. *See* Prosper Decl. ¶¶ 7-8, App. 103-05; Waxman Decl. ¶¶ 6-7, App. 110-11. To conclude that an injunction is nevertheless necessary to prevent irreparable harm would require the district court to determine, without evidence to that effect or authorization by Congress, that the Executive's judgments regarding the likelihood of torture are erroneous. *Munaf*, however, rejected as legally impermissible judicial "second-guess[ing of] such determinations." 128 S. Ct. at 2226; *accord id.* at 2225. Thus, in light of *Munaf*, it is now abundantly clear that petitioners' speculative claims of potential mistreatment do not meet the "high standard" for demonstrating that their transfer will result in irreparable harm.

Nor can petitioners demonstrate that they would suffer irreparable harm if the district court were deprived of habeas jurisdiction as a result of their transfer or release from Guantanamo Bay to another country. *Munaf* specifically rejected the loss of habeas jurisdiction as irreparable harm to support an injunction against

transfer, concluding that the district court had erred in entering an injunction on that ground. *Id.* at 2220. Indeed, petitioners ultimately *seek* transfer or release from United States custody through their habeas actions. Transfer or release, and the concomitant loss of habeas jurisdiction, therefore cannot constitute irreparable harm for purposes of obtaining injunctive relief. *See id.* at 2221, 2223; *see also Al-Anazi*, 370 F. Supp. 2d at 198.

3. The Injunctions Harm The United States By Substantially Impairing The Executive Branch's Authority

As stated above and in our initial briefs, the injunctions here foreshadow (and are meaningless without the possibility of) judicial review of decisions regarding petitioners' transfer. Indeed, petitioners explicitly urge such judicial review. Resp. at 5. Such judicial intervention not only curbs the political branches' discretionary authority in determining when to transfer detainees, but also impairs the Government's ability to speak with one voice in negotiating transfers with foreign nations. As *Munaf* held, "[t]he Judiciary is not suited to second-guess such determinations [respecting the likelihood of torture] – determinations that would require federal courts to pass judgment on foreign judicial systems and undermine the Government's ability to speak with one voice in this area." 128 S. Ct. at 2226; *see also Crosby*, 530 U.S. at 381. And even if judicial review did not result in an injunction barring transfer, "[r]equiring the United States to unilaterally disclose

information about proposed transfers and negotiations outside of appropriate executive branch agencies could adversely affect the relationship of the United States with other countries and impede our country's ability to obtain vital cooperation from concerned governments with respect to military, law enforcement, and intelligence efforts, including with respect to our joint efforts in the war on terrorism." Waxman Decl. ¶ 8, App. 111-12. The delay in transfer that review entails could lead to similar harm. *Id.* These harms in and of themselves militate sharply against the injunctions entered here.

4. The Injunctions Are Contrary To The Public Interest

Finally, as also set forth in our initial briefs, the public interest plainly favors allowing the Executive Branch, which is constitutionally vested with the authority both to conduct military functions, such as detention of enemy combatants during hostilities, and to engage in foreign relations, to act without undue intrusion within its constitutional sphere of responsibility. *Munaf* reiterates that the public interest generally requires that courts be "'reluctant to intrude upon the authority of the Executive in military and national security affairs.'" 128 S. Ct. at 2218; *see also id.* at 2225. As the courts have explained in the same context that is at issue here, "there is a strong public interest against the judiciary needlessly intruding upon the foreign policy and war powers of the Executive on a deficient factual record." *Al-Anazi*, 370

F. Supp. 2d at 199. Indeed, "[w]here the conduct of the Executive conforms to law, there is simply no benefit – and quite a bit of detriment – to the public interest from the [c]ourt nonetheless assuming for itself the role of a guardian ad litem for the disposition of these detainees." *Id.* The public interest strongly counsels against issuance of the district court's injunctions barring transfer.

CONCLUSION

For the foregoing reasons, and the reasons set forth in our initial briefs, we respectfully request that this Court vacate the district court orders for lack of subject-matter jurisdiction. In the alternative, we ask that the Court reverse the orders granting injunctive relief below.

Respectfully submitted,

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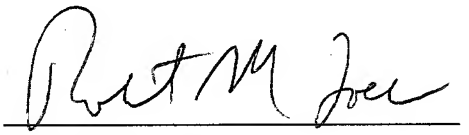
AUGUST 2008

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), D.C. Circuit Rule 32(a), and the Court's July 31, 2008 order, that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 7,961 words (which does not exceed the applicable 8,000 word limit), according to the word-count of Corel Wordperfect Version 12.



Robert M. Loeb

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2008, I filed and served the foregoing Supplemental Brief of Appellants by causing an original and fourteen copies to be delivered to the Court by hand delivery, and by causing two paper copies to be delivered to lead counsel of record as indicated:

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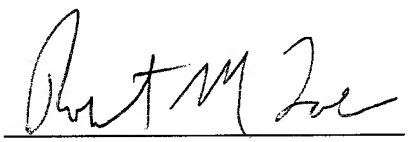

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